TION FILED
NOV 7 1980

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al., *Appellees-Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Appellants-Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION TO INTERVENE AS RESPONDENT OR, ALTERNATIVELY, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

BRIEF FOR INTERVENOR-RESPONDENT/AMICUS CURIAE, RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY IN OPPOSITION

JOSEPH GALLO
1120 Connecticut Ave., N.W.
Suite 325
Washington, D.C. 20036
(202) 833-9730
Counsel for Intervenor-Respondent/Amicus Curiae

ROBERT H. WHEELER
JOHN W. ROWE
JAMES A. CARNEY
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 558-7500
Counsel for Intervenor-Respondent/Amicus Curiae

Of Counsel:
ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603

November 7, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al., *Appellees-Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Appellants-Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION TO INTERVENE AS RESPONDENT OR, ALTERNATIVELY, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

JOSEPH GALLO
1120 Connecticut Ave., N.W.
Suite 325
Washington, D.C. 20036
(202) 833-9730
Counsel for Intervenor-Respondent/Amicus Curiae

ROBERT H. WHEELER
JOHN W. ROWE
JAMES A. CARNEY
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 558-7500
Counsel for Intervenor-Respondent/Amicus Curiae

Of Counsel:
ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603

November 7, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al., *Appellees-Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Appellants-Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION TO INTERVENE AS RESPONDENT OR, ALTERNATIVELY, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

Richard B. Ogilvie, Trustee ("Milwaukee Road Trustee") of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road"), hereby respectfully moves to intervene in this case as a respondent and attaches hereto his brief for intervenor-respondent in opposition for filing in this case, in the event this motion is granted.

The Milwaukee Road Trustee hereby also respectfully moves, alternatively, for leave to file the attached brief as amicus curiae in opposition in this case, in the event his motion to intervene is denied. The consent of

the Attorneys for the respondents for the filing of a brief amicus curiae has been requested and such consents will be filed, if obtained. The consent of the Attorneys for the petitioners was requested but refused.

The Milwaukee Road Trustee's interest in opposing the Petition is based on the fact that he is a party to an appeal presently pending in the Court of Appeals for the Seventh Circuit (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, No. 80-1364; "Milwaukee Road Appeal") in which the same issues as to which the Petition seeks review before this Court have been raised. Those issues are (1) whether legislation imposing obligations for the financial protection of displaced employees of an insolvent employer constitute an uncompensated "taking" in violation of the Fifth Amendment to the United States Constitution and (2) whether Congress has authority under the Bankruptcy Clause to enact particularized legislation of that nature addressed to the specific problems facing less than all insolvent railroads and their employees. At the same time, Petitioners, themselves, are parties to another appeal, also presently pending before the Court of Appeals for the Seventh Circuit (*In re Chicago, Rock Island, and Pacific Railroad Co.*, No. 80-2487; "Rock Island Seventh Circuit Appeal") that involves exactly the same issues and parties as those the Petition seeks to bring before the Court in this matter. The Milwaukee Road Trustee has been granted leave to appear in the Rock Island Seventh Circuit Appeal as Amicus Curiae and to file his principal brief in the Milwaukee Road Appeal as a brief amicus curiae in the Rock Island Seventh Circuit Appeal.

The Court of Appeals for the Seventh Circuit has set the briefing schedules and the date for oral argument

in both the Milwaukee Road and Rock Island Seventh Circuit Appeals to coincide. It took such action pursuant to Title VII, Section 701(a)(1) of the Railroad Transportation Policy Act of 1980, Pub. L. No. 96-448 ("Staggers Act"), which establishes primary appellate jurisdiction over both appeals in the Court of Appeals for the Seventh Circuit and requires that they be determined "in a consolidated proceeding".

That statutory procedure for the consolidated review in the two appeals reduces the practical burdens on the several parties participating in both appeals, including the Milwaukee Road Trustee (as appellee in the Milwaukee Road Appeal and as amicus curiae in the Rock Island Seventh Circuit Appeal) and the Railway Labor Executives' Association, the Interstate Commerce Commission and the United States Secretary of Transportation (all as appellees in the Milwaukee Road Appeal and as appellants in the Rock Island Seventh Circuit Appeal) by enabling them to consolidate their efforts in preparing briefs and for oral argument in both appeals. The Petition, if granted, would deny those parties the benefits of that statutory procedure, by separating the two appeals involving virtually identical issues of constitutional law for simultaneous review in two different courts at two different levels of the federal judicial system.

It is in order to protect his legal and practical interest in a consolidated proceeding, as provided for under the Staggers Act, that the Milwaukee Road Trustee seeks to intervene in this matter as a respondent or, alternatively, leave to file a brief amicus curiae. In further support of his motion to intervene for the first time before this Court, the Milwaukee Road Trustee points out that the jurisdictional issues affecting his interest in that statutory consolidation procedure have

been raised for the first time by the Petition and by a complementary motion to dismiss or certify the question, filed with the Court of Appeals only five days earlier than the filing of the Petition with this Court. (Counsel for the Milwaukee Road Trustee first learned of both that motion to dimiss or certify the question and the Petition herein on the same day.) Accordingly, there was no reason for the Milwaukee Road Trustee to seek earlier intervention as a party in interest to the Rock Island controversy in either the District Court or the Court of Appeals.

In further support of his alternative motion for leave to file a brief amicus curiae, the Milwaukee Road Trustee points out that, because the jurisdictional issues affecting his procedural rights have not previously been joined in this case, in either the District Court or the Court of Appeals, he is without sufficient information to judge whether respondents are likely to pursue a course of argument that will adequately address those issues.

Respectfully submitted,

Joseph Gallo
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9730

Counsel for Intervenor-Respondent/Amicus Curiae

ROBERT H. WHEELER
JOHN W. ROWE
JAMES A. CARNEY
ISHAM, LINCOLN & BEALE

Counsel for Intervenor-Respondent/Amicus Curiae

Of Counsel:

ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603

Dated: November 7, 1980

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al., *Appellees-Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Appellants-Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR INTERVENOR-RESPONDENT/AMICUS CURIAE, RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY IN OPPOSITION

JOSEPH GALLO
1120 Connecticut Ave., N.W.
Suite 325
Washington, D.C. 20036
(202) 833-9730
Counsel for Intervenor-Respondent/Amicus Curiae

ROBERT H. WHEELER
JOHN W. ROWE
JAMES A. CARNEY
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 558-7500
Counsel for Intervenor-Respondent/Amicus Curiae

Of Counsel:
ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603

November 7, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

The Milwaukee Road Trustee disagrees with the Petition's Statement of the Question Presented. The Questions Presented are whether:

(1) Title VII, Section 701 (a)(1) of the Staggers Act effectively removes this entire controversy, including the appeal that was pending prior to enactment of that legislation, from the jurisdiction of this Court, *first* by repealing the Court's former direct appellate jurisdiction over the controversy under 28 U.S.C. §1252 and *second* by rendering moot the related appeal already pending before the Court, upon which jurisdiction over the review sought by the Petition must rest, if at all.

(2) Whether the Court should grant the Petition, as a matter of discretion under 28 U.S.C. §1254(1) and §2101(e), where there is no sound basis in policy for such action.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE INTERVENOR-RESPONDENT/AMICUS 1

JURISDICTION 5

STATEMENT OF THE CASE 5

ARGUMENT 6

I. The Staggers Act Amendments To The Rock Island Act Remove This Entire Controversy From The Court's Jurisdiction 7

A. The Staggers Act jurisdictional provisions apply with respect to the already pending appeal 7

B. The mootness of the pending appeal renders it subject to dismissal. It cannot, therefore, serve as the basis for the Court's jurisdiction over related matters 12

II. The Discretionary Grant Of The Petition Would Frustrate The Clear Congressional Mandate That The Similar Constitutional Issues Raised In Both The Milwaukee Road And Rock Island Cases Be Subject To Initial Appellate Review On A Consolidated Basis And Would Serve No Useful Function 13

CONCLUSION 15

APPENDICES:

A. Order (No. 286) And Attached Decision Of the United States District Court, February 7, 1980 . a-1

B. Notice Of Appeal To The United States Court Of Appeals For The Seventh Circuit b-1

C. Excerpts From The Milwaukee Railroad Restructuring Act c-1

Table of Contents Continued

PAGE

D. Order Of The United States Court Of Appeals For The Seventh Circuit, November 3, 1980.... d-1

E. Order Of The United States Court Of Appeals For The Seventh Circuit, November 3, 1980.... e-1

TABLE OF AUTHORITIES

CASES: PAGE

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 10, 11

Bruner v. *United States*, 343 U.S. 112 (1952)..... 9

Bryan v. *Austin*, 354 U.S. 933 (per curiam 1957) 12

De La Rama Steamship Co. v. *United States*, 344 U.S. 386 (1953)..... 9

Diffenderfer v. *Central Baptist Curch of Miami, Florida*, 404 U.S. 412 (per curiam 1971) 12

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) 8, 9

Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) 9

Florida Lime & Avocado Growers, Inc. v. *Jacobsen*, 362 U.S. 73 (1960)..... 10, 11

Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962)..... 9

Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974)..... 10, 11

Gwin v. *United States*, 184 U.S. 669 (1902) 10

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 611 F.2d 662 (7th Cir. 1979)..... 2

Phillips v. *United States*, 312 U.S. 246 (1941) 10

Railroad Co. v. *Grant*, 98 U.S. 398 (1879)..... 10

Railway Labor Executives Association v. *Gibbons*, _____ U.S. _____, 100 S. Ct. 2668 (1980) (Stevens, J., as Circuit Justice) 5, 12

Table of Authorities Continued

CASES:	PAGE
Regional Rail Reorganization Cases, 419 U.S. 102 (1974)	12
Stainback v. *Mo Hock Ke Lock Po*, 336 U.S. 368 (1949)	10
Swift & Company v. *Wickham*, 382 U.S. 111 (1965)	10
United Mine Workers of America v. *Gibbs*, 383 U.S. 715 (1966)	13
United States v. *Alaska Steamship Co.*, 253 U.S. 113 (1920)	12
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 937 (1952)	11
STATUTES:	
Bankruptcy Act of 1938, §77, 11 U.S.C. §205	2
Milwaukee Railroad Restructuring Act, 45 U.S.C.A. §901, *et seq*	2
Railroad Transportation Policy Act of 1980 Pub. L. No. 96-448 ("Staggers Act"), Title VII, §701	*passim*
Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C.A. 1001, *et seq*.	*passim*
28 U.S.C. §1252	*passim*
28 U.S.C. §1253	10
28 U.S.C. §1254(1)	13
28 U.S.C. §1257	8
28 U.S.C. §2101(e)	13
LEGISLATIVE MATERIAL:	
H.R. Rep. No. 1430, 96th Cong., 2d Sess. (1980).....	5

Table of Authorities Continued

OTHER AUTHORITIES:	PAGE
Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362 (1953)	9
Hon. John M. Harlan, *Manning the Dikes,* 13 Record of the Association of the Bar of the City of New York 541 (1958)	10
Letter from 9 Supreme Court Justices to Senator De Concini, dated June 22, 1978	10

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al., *Appellees-Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Appellants-Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR INTERVENOR-RESPONDENT/AMICUS CURIAE, RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY IN OPPOSITION[1]

INTEREST OF THE INTERVENOR-RESPONDENT/AMICUS

Richard B. Ogilvie ("Milwaukee Road Trustee") is the duly appointed trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad

[1] This Brief is submitted for filing as the Milwaukee Road Trustee's Brief in Opposition, in his capacity as Intervenor-Respondent, in the event his accompanying Motion To Intervene is granted, or in his capacity as Amicus Curiae, in the event his alternative Motion for Leave to File Brief Amicus Curiae is granted.

Company ("Milwaukee Road"), which, like the Chicago, Rock Island and Pacific Railroad Company ("Rock Island"), is currently undergoing reorganization, pursuant to Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. §205 (1976), in a proceeding pending in the United States District Court for the Northern District of Illinois (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, No. 77 B 8999). *See In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 611 F.2d 662 (7th Cir. 1979).

The Milwaukee Road Trustee's interest in opposing the Petition is based on the fact that he is a party to a pending appeal before the Court of Appeals for the Seventh Circuit (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, No. 80-1346; "Milwaukee Road Appeal") that involves substantially the same constitutional issues as to which the Petition seeks initial review by this Court.[2] At the same time, Petitioners,

---

[2] *See* February 7, 1980 Order (No. 286) and attached Decision in the Milwaukee Road reorganization proceeding, which appears at Appendix ("MRT App.") A, pp. a-1, *et seq. infra* and Notice of Appeal therefrom, which appears at MRT App. B, p. b-1 *infra*. *Compare* the following record from the Rock Island reorganization proceeding, which appears in the Appendix to the Petition ("Pet. App."): October 15, 1980 Order (Pet. App. B, pp. b-1, *et seq.*); Excerpts from transcript of Proceedings, October 7, 1980 (Pet. App. B, pp. b-1, *et seq.*); June 9, 1980 Preliminary Injunction (Pet. App. D, pp. d-1, *et seq.*); Excerpts from the transcript of Proceedings, June 9, 1980 (Pet. App. C, pp. c-1, *et seq.*); Excerpts from Record of Proceedings, June 20, 1980 (Pet. App. E, pp. e-1, *et seq.*)

Sections 9, 13 and 15 of the Milwaukee Road Restructuring Act, Pub. L. No. 96-101, 45 U.S.C.A. §§908, 912, 914 (Supp. 1980) ("Milwaukee Road Act"), the constitutionality of which is at issue in the Milwaukee Road Appeal appear at MRT App. C, pp. c-1, *et seq. infra*. They provide for a program of employee protection benefits that is substantially identical to the program set forth in Sections 106 and 110 of the Rock Island Railroad Transition and

themselves, are parties to another appeal, also presently pending before the Court of Appeals for the Seventh Circuit (*In re Chicago, Rock Island and Pacific Railroad Co.*, No. 80-2487; "Rock Island Seventh Circuit Appeal"), that involves exactly the same parties and issues as those the Petition seeks to bring before the Court in this matter. Pet. at 3, 17. The Milwaukee Road Trustee has been granted leave to appear in the Rock Island Seventh Circuit Appeal as amicus curiae[3] and to file his principal brief in the Milwaukee Road Appeal as his brief amicus curiae in the Rock Island Seventh Circuit Appeal.[4]

The Court of Appeals for the Seventh Circuit has set the briefing schedules and the date for oral argument in both the Milwaukee Road and Rock Island Seventh Circuit Appeals to coincide. The Court of Appeals took such action pursuant to of Title VII, Section 701(a)(1) of the Staggers Act (Pet. App. J, pp. j-1, *et seq.*), which replaces former Section 124(a) and (b) of the Rock Island Act with provisions that establish primary appellate jurisdiction over both appeals in the Court of

---

Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C.A. §§1005, 1008 (Supp. 1980) ("Rock Island Act") (Pet. App. I, pp. i-1, *et seq.*.), as amended by Title VII, Section 701 of the Railroad Transportation Policy Act of 1980, Pub. L. No. 96-448, H. R. Rep. No. 1430, 96th Cong., 2d Sess. (1980), *reprinted in* 126 Cong. Rec. H. 9911-12 (daily ed. sept. 29, 1980) ("Staggers Act") (Pet. App. J, pp. j-1, *et seq.*). It is the constitutionality of Sections 106 and 110 of the Rock Island Act, as amended, that would be at issue in the review sought by the Petition and that is already at issue in the Rock Island Seventh Circuit Appeal. Pet. at 4-8.

[3] *See* Order dated November 3, 1980, which appears at MRT App. D, p. d-1 *infra*.

[4] *See* Order dated November 3, 1980, which appears at MRT App. 3, p. e-1 *infra*.

Appeals for the Seventh Circuit and requires that they be determined "in a consolidated proceeding."[1]

That statutory procedure for the consolidated review in the two appeals reduces the practical burdens on the several parties participating in both appeals, including the Milwaukee Road Trustee (as an appellee in the Milwaukee Road Appeal and as amicus curiae in the Rock Island Seventh Circuit Appeal) and the Railway Labor Executives' Association, the Interstate Commerce Commission and the United States Secretary of Transportation (all as appellees in the Milwaukee Road Appeal and as appellants in the Rock Island Seventh Circuit Appeal) by enabling them to consolidate their efforts in preparing briefs and for oral argument in both appeals. The Petition, if granted, would deny those parties the benefits of that statutory procedure, by separating the two appeals involving virtually identical issues of constitutional law for simultaneous review in two different courts at two different levels of the federal judicial system. It is in order to protect his legal and practical interest in a consolidated proceeding, as provided for under the Staggers Act, that the Milwaukee Road Trustee has sought to intervene in this matter as a respondent or, in the alternative, for leave to file a brief amicus curiae in opposition.

---

[1] Although the Court of Appeals denied a motion by the Milwaukee Road Trustee to formally consolidate the Milwaukee Road and Rock Island Seventh Circuit Appeals (erroneously the Milwaukee road Trustee believes), the procedures established effect the same practical result.

JURISDICTION

The Court does not have jurisdiction under 28 U.S.C. §1252 to grant the Petition because Title VII, Section 701 (a)(1) of the Staggers Act removes the applicability of 28 U.S.C. §1252 to this entire controversy as discussed more fully in Part I of the Argument.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition inappropriately characterizes (Pet. at 7) Judge McGarr's Order of October 15, 1980, for which the Petition seeks review, as having "concern[ed] the *same statute* and the *same injunction*" (emphasis in the original) as to which the previously pending appeal before this Court[6] (from Judge McGarr's Order of June 9, 1980) is related. To the contrary, Sections 106 and 110 of the Rock Island Act had been amended and supplemented by Title VII, Section 701(a)(1) of the Staggers Act between the time of the June 9, 1980 Order and the time of the October 15, 1980 Order, in a specific attempt to cure the constitutional deficiencies suggested by the June 9, 1980 Order. *See* H.R. Rep. No. 1430, 96th Cong., 2d Sess. (1980), *reprinted in* 126 Cong. Rec. H9931 (daily ed. Sept. 29, 1980). Accordingly, as discussed in Part IB of the Argument, a *new statute* was involved in the October 15, 1980 Order and the Order, therefore, had the effect of establishing a *new injunction.*

The statement (Pet. at 8) that "[a]n appeal in this matter . . . is pending before this Court . . ." is correct as far as it goes. It fails to recognize further, however,

---

[6] *Railway Labor Executives' Association* v. *Gibbons,* No. 80-8415 (the "Pending Appeal").

that the amendments to the Rock Island Act in Title VII, Section 701(a)(1) of the Staggers Act (1) have now removed the Pending Appeal from this Court's jurisdiction and (2) have otherwise rendered that Pending Appeal moot, as discussed in Parts IA and IB of the Argument *infra*, respectively. The Statement (Pet. at 8) that "[a]voidance of inconsistent adjudications and piecemeal appellate review, judicial economy . . . mandate that the sole issue raised in this appeal (sic) should be determined in a single comprehensive proceeding, with the issues . . . in the direct appeal already pending before this Court" also fails to recognize that point, as discussed in Part II of the Argument *infra*.

ARGUMENT

The Milwaukee Road Trustee respectfully submits that a writ of certiorari should not issue for several independent and self-sufficient reasons:

First, the jurisdictional provisions of the Staggers Act amendments to the Rock Island Act effectively remove this entire controversy from the Court's jurisdiction, even as to the Pending Appeal, which should therefore be dismissed.

Second, the substantive provisions of the Staggers Act amendments to the Rock Island Act render the Pending Appeal moot. For that reason also, it should be dismissed. In turn, the pendency of an appeal that is subject to dismissal as being moot cannot be justified as the sole basis for asserting the Court's jurisdiction over the remaining parts of the "whole case."

Finally, to grant the Petition prior to intermediate review by the Court of Appeals, as an exercise of this Court's discretionary jurisdiction, would be to ignore the

clear Congressional mandate that the initial appellate review of both the Rock Island case and the Milwaukee Road case be conducted on a consolidated basis. Conversely, because the Pending Appeal in the Rock Island case is now subject to dismissal on either or both of the grounds stated above, there is no basis in policy for this Court to bypass an intermediate appellate review of related matters. Rather, the relevant policy considerations militate strongly in favor of denying the Petition.

I. The Staggers Act Amendments To The Rock Island Act Remove This Entire Controversy From The Court's Jurisdiction

A. The Staggers Act jurisdictional provisions apply with respect to the already pending appeal.

Petitioners' argument (Pet. at 8-10) that the Pending Appeal in the Rock Island controversy establishes the Court's primary appellate jurisdiction over the "whole case", including primary jurisdiction to review Judge McGarr's later October 15, 1980 Order, necessarily assumes that the Court has *continuing* primary jurisdiction over the Pending Appeal. *See* Pet. at 10-12.

However, the Staggers Act amendment replacing Section 124(a) of the Rock Island Act (Pet. App. J, p.j-1) unambiguously provides in part:

> Sec. 124 (a) Notwithstanding any other provisions of law, *any appeal* from —
>
> (1) *any decision* . . . with respect to the Constitutionality of any provision of this Act . . .
>
> (2) . . . shall be taken to the United States Court of Appeals for the Seventh Circuit. (Emphasis added)

That amendment effectively repeals the Court's primary appellate jurisdiction under 28 U.S.C. §1252, as applied to this entire controversy, including the Pending Appeal.[7]

Contrary to the Petitioners' suggestion (Pet. at 11, n. 4) there is nothing on the face of the Staggers Act amendment to Section 124(a) of the Rock Island Act (Pet. App. J, p. j-1) that limits applicability of that jurisdictional provision to appeals taken "*subsequent*" to its enactment. (Emphasis in the original) Apparently recognizing the weakness of their position in that regard, Petitioners advance the argument (Pet. at 9-12) that, for reasons of policy, such jurisdictional repeals should not be interpreted as applying to pending actions or appeals, absent express statutory language stating that they should so apply.[8] The correct rule of statutory construction is exactly the converse.

---

[7] We note, however, that the Staggers Act amendment does not remove the Court's jurisdiction under 28 U.S.C. §1252, or such other statutes as 28 U.S.C. §1257, to ultimately review the merits of the controversy at an appropriate later date, after the Seventh Circuit has conducted its intermediate appellate review provided for in the amendment, on a consolidated basis with the Milwaukee Road Appeal.

[8] Petitioners' suggestion (Pet. at 11) that an interpretation of the amendment, holding it applicable to pending appeals, raises "fundamental issues concerning the constitutional separation of powers and due process principles" is palpably without merit. That Congress has the constitutional authority to adjust the distribution and timing of jurisdiction among the various courts within the federal system, even as to pending cases, was long ago established in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Petitioners further suggestion (Pet. at 12, n.5) that the continuing vitality of the decision in the *McCardle* case may now be subject to question fails to distinguish the very limited holding in that case from the broader sweep of the dicta set forth in the Court's opinion. It may be that the suggestion in the *McCardle* case, that Congress has the power to totally withdraw all jurisdictional means by which the Supreme

As stated in *De La Rama Steamship Co., Inc.* v. *United States,* 344 U.S. 386, 390 (1953):

> When the very purpose of Congress is to take away jurisdiction, of course it does not survive, *even as to pending suits,* unless expressly reserved. *Ex parte McCardle,* 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hollowell* v. *Commons,* 239 U.S. 506, and *Bruner* v. *United States,* 343 U.S. 112. If the aim is to destroy a tribunal or to take away cases from it, *there is no basis for finding saving exceptions unless they are made explicit.* (Emphasis added)

After tracing the long history of this fundamental principle and referring to several earlier decisions in which it had found repeated application, this Court concluded, in *Bruner* v. *United States,* 343 U.S. 112, 116-17 (1952):

> This rule — that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law — has, been adhered to consistently by this Court. (Footnote and extensive citations therein omitted).

Court might ultimately review the merits of already pending cases, is subject to question. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialcetic.* 66 Harv. L.Rev. 1362, 1364-65 (1953). However, in *Ex parte Yerger* 75 U.S. (8 Wall.) 85 (1868) the jurisdictional repeal at issue in the *McCardle* case was subsequently interpreted as having left intact the Supreme Court's discretionary power to review similar cases on petitions for habeas corpus and certiorari. Accordingly, the precise holding in the *McCardle* case merely establishes Congressional authority to limit the alternative jurisdictional means by which judicial consideration or review of a controversy might ultimately take place. The results in more recent cases, discussed in the succeeding paragraphs of this Part I A, confirm the continuing vitality of that principle, even as applied to pending controversies. *See also Glidden Co.* v. *Zdanok,* 370 U.S. 530, 567-68 (1962). The jurisdictional amendment in this case does no more. *See* n.7, *supra.*

See also Gwin v. *United States,* 184 U.S. 669, 675 (1902) and *Railroad Co.* v. *Grant,* 98 U.S. 398, 401 (1879) (both involving the repeal of Supreme Court jurisdictional statutes). The Petitioners' transparent attempt to turn this time-honored rule of statutory construction on its head cannot be allowed to succeed.

Application of the jurisdictional repeal in the Staggers Act to the Pending Appeal in this case is also "consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interest of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 98 (1974) (footnote omitted). That policy has been relied upon repeatedly as the basis for strictly construing the Court's mandatory jurisdiction under 28 U.S.C. §1253, which, like 28 U.S.C. §1252, provides for direct appeals from certain district court orders. *See, e.g. Allen* v. *State Board of Elections,* 393 U.S. 544, 561-62 (1969); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128-29 (1965); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 375 (1949); *Phillips* v. *United States,* 312 U.S. 246, 250-51 (1941). *See also Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 92 *et seq.* (1960) (Frankfurter, J., dissenting). Indeed, the valuable function that adherence to that policy serves, of enabling the Court to focus its attention on cases of great public importance, has been emphasized, not infrequently, by the individual Justices of this Court outside their written opinions. *See, e.g.,* June 22, 1978 letter from the nine Justices of this Court to Senator De Concini, endorsing certain proposed limitations on the Supreme Court's mandatory jurisdiction, *reprinted in* 125 Cong. Rec. S4140-41 (daily ed. April 9, 1979); Hon. John M. Harlan, *Manning The Dikes* (Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional State-

ment Practice of the Supreme Court of the United States), 13 Record of the Ass'n of the Bar of the City of New York 541, 558-61 (1958), *reprinted in* Hart and Wechsler, The Federal Courts and the Federal System 1605 (2d ed. 1973). Congress' response to those pleas, in this instance, should not be ignored by acceptance of Petitioners' suggested strict construction of legislation eliminating the Court's mandatory jurisdiction over direct appeals relating to the Rock Island and Milwaukee Road Acts.

Finally, rejection of the Petitioners' suggested strict construction of the Staggers Act jurisdictional limitation also enables intermediate review by the Court of Appeals of a case involving the complex relationship between the regulation of a highly technical industry and the relevant constitutional principles governing such regulation. The valuable refinement of issues that such intermediate review may provide in cases ultimately brought before this Court for final review has also been repeatedly relied upon by the Court in past decisions as a policy basis for the strict construction of jurisdictional provisions that, like the one in 28 U.S.C. §1252, provide for direct appeals to this Court from certain district court orders. *See, e.g., Allen* v. *State Board of Elections,* 393 U.S. 544, 561-62 (1969). *See also Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 92-93 (1960) (Frankfurter, J., dissenting); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of cert.). That policy dictates that the same result should obtain in this case.

B. The mootness of the pending appeal renders its subject to dismissal. It cannot, therefore, serve as the basis for the Court's jurisdiction over related matters.

At the time of Judge McGarr's June 9, 1980 Order, from which the Pending Appeal was taken, there was considerable doubt as to whether the Rock Island Act should be interpreted as preserving relief by way of a Court of Claims action to remove the purported constitutional deficiencies in the Act. *See* Excerpts from Transcript of Proceedings, June 20, 1980, appearing at Pet. App. E, p. e-5. *See also Railway Labor Executives' Association* v. *Gibbons* _____ U.S. _____, 100 S.Ct. 2668, 2671 (Stevens, J., as Circuit Justice 1980). Title VII, Section 701 (a)(1) of the Staggers Act (Pet. App. J., pp. j-1, *et seq.*) subsequently amended the Rock Island Act by replacing Section 124(c) of the Rock Island Act with a provision clarifying that such relief remains available thereunder. *See also* Section 701(a)(2) of the Staggers Act. That substantive amendment changed the relevant law under which Judge McGarr's June 9, 1980 Order had been entered,[9] rendering that injunctive Order and the Pending Appeal from it both moot. *Diffenderfer* v. *Central Baptist Curch of Miami, Florida,* 404 U.S. 412, 414 (1972) (per curiam); *Bryan* v. *Austin,* 354 U.S. 933 (1957) (per curiam); *United States* v. *Alaska Steamship Co.,* 253 U.S. 113, 115-16 (1920). The Pending Appeal should therefore be summarily dismissed.[10] *Id.*

---

[9] In the *Regional Rail Reorganization Cases,* 419 U.S. 102 (1974), this Court held that relief by way of a Court of Claims action, when available, is sufficient to cure an otherwise constitutionally deficient uncompensated "taking" of the nature found by Judge McGarr in his June 9, 1980 Order (*See* Pet. at 5).

[10] The Milwaukee Road Trustee plans to file, as expeditiously as possible after the filing of this Brief, a Motion to Intervene in the Pending Appeal and will be submitting therewith, for filing in the event the first Motion is granted, a Motion to Dismiss the Pending Appeal.

Because the Pending Appeal is now moot and, therefore, subject to dismissal, it cannot be permitted to be used by Petitioners as a "bootstrap" to support the Court's jurisdiction over related matters as to which the Court is otherwise so clearly lacking jursdiction. In *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1966), the Court pointed out that where the federal claims serving as the federal jurisdictional basis for pendent state claims are found to be insubstantial or are subject to dismissal on some other basis prior to trial, the entire case, including the pendent state claims, should be dismissed. By analogy, "pendent appeals" under the second paragraph in 28 U.S.C. §1252 should not be permitted to proceed where the principal appeal is subject to dismissal (*e.g.* as being moot) prior to consideration of the merits.

II. The Discretionary Grant Of The Petition Would Frustrate The Clear Congressional Mandate That The Similar Constitutional Issues Raised In Both The Milwaukee Road And Rock Island Cases Be Subject To Initial Appellate Review On A Consolidated Basis And Would Serve No Useful Function.

The Amendment in Title VII, Section 701(a)(1) of the Staggers Act, replacing former Section 124(b) of the Rock Island Act, unambiguously expresses Congress' intent that the similar constitutional issues raised by both the Milwaukee Road and Rock Island Seventh Circuit Appeals (and which the Petition seeks to bring before this Court) be subject to initial appellate review "in a consolidated proceeding." Petitioners' suggestion (Pet. at 13, n.6) that the Staggers Act jurisdictional provision does nothing to affect this Court's discretionary jurisdiction under 28 U.S.C. §1254(1) and §2101(e) conspicuous-

ly ignores that Congressional mandate. To grant the Petition prior to intermediate review, as an exercise of this Court's discretionary jurisdiction, would totally frustrate the clear Congressional intent that the two appeals be subject to a consolidated proceeding.[11]

The Milwaukee Road Trustee does not disagree with Petitioners' suggestion (Pet. at 15-16) that there are issues of great public importance involved in the merits of the Rock Island case. However, the Petitioners totally ignore that virtually the same issues of great public importance are also involved in the Milwaukee Road Appeal. Congress has taken the extraordinary step of mandating that the appellate review of the great issues in both the Rock Island and Milwaukee cases be provided on a consolidated basis, presumably so that the reviewing court may have as complete and comprehensive an understanding of these cases as can be made possible. The Petition seeks to frustrate that very substantial Congressional purpose by artifically fragmenting the deliberation and decision in these matters. Such a result is not only inconsistent with the most basic principles governing the separation of powers, but is contrary as well to the sound administration of justice.

---

[11] Beyond the convenience it affords the parties to both the Milwaukee Road and Rock Island Seventh Circuit Appeals (see discussion in the statement of Interest of the Intervenor-Respondent/Amicus at 4 *supra*) that statutory procedure for consolidated proceedings before the Court of Appeals serves the very same policies of sound judicial administration that Petitioners discuss at length (Pet. at 13-15) in Part II of the Petition. Conversely, because the Pending Appeal is subject to dismissal on the grounds stated in Part IA (lack of appellate jurisdiction under 28 U.S.C. §1252) and Part IB (mootness) of the Argument *supra*, those policies of sound judicial administration do not support a discretionary grant of the Petition, as argued by Petitioners. Rather, for the reasons already stated, they militate strongly against such action.

CONCLUSION

For the foregoing reasons, any one of which should suffice, the Milwaukee Road Trustee submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ JOSEPH GALLO
Joseph Gallo
1120 Connecticut Ave., N.W.
Suite 325
Washington, D.C. 20036
(202) 833-9730

Counsel for Intervenor-Respondent/Amicus Curiae

ROBERT H. WHEELER
JOHN W. ROWE
JAMES A. CARNEY
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 558-7500

Counsel for Intervenor-Respondent/Amicus Curiae

Of Counsel:

ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603

November 7, 1980

APPENDIX

APPENDIX A

Order (No. 286) And Attached Decision Of The United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor.*

In Proceedings for the Reorganization of a Railroad

No. 77 B 8999

February 7, 1980

Trustee's motions of Nov. 1, 1979 to borrow $75 million from the F.R.A. to finance a labor protection settlement program & of Jan. 3, 1980 for a hearing & approval of the specific agreement are granted, & he may serve & present an appropriate order. (Decision attached)

/s/ McMILLEN, J.

DECISION ON EMPLOYEE PROTECTION AGREEMENT

The Trustee filed a motion dated November 1, 1979 seeking authority to borrow up to $75 million from the Federal Railroad Administration to finance a labor protection settlement program. The funds were sought for the purpose of satisfying claims of terminated employees if and when the Trustee's reorganization plan went into effect. On November 4, 1979, the President signed P.L. 96-101, commonly known as the Milwaukee Railroad Restructuring Act, by which an employee protection agreement was mandated by Section 9. Therefore, the Trustee's motion to borrow funds will now be considered in the context of an agreement covered by that

Act. Section 15 of the statute provides that a loan of $75 million will be guaranteed by the Secretary of Transportation to finance the agreement and that any obligation guaranteed for this purpose will be "treated as an administrative expense of the estate." Claims of the individual employees filed pursuant to the agreement are to be paid as administrative expenses pursuant to Section 9(d).

After the M.R.R.A. went into effect, the Trustee did negotiate an employee protection agreement with various labor organizations representing his employees. Thereafter, by a motion filed January 3, 1980, he asked for a hearing and approval of the specific agreement, and such a hearing was held on January 10, 1980 on both motions.

In ruling on these two motions, the provisions of Sections 9 and 15 of P.L. 96-101 are intimately involved. We will not reproduce the specific sections herein, however, because the entire Act is attached to our decision of November 23, 1979, and Sections 9 and 15 are now codified at 45 U.S.C. § 908 and § 914. A decision on the Trustee's motions is considerably facilitated by the bench marks already established by our previous decisions and by the decision of the Seventh Circuit Court of Appeals in this case (Nos. 79-1494, -1675, -1683, and -1698) dated October 2, 1979). We have concluded on the basis of the record that the pertinent provisions of Sections 9 and 15 of P.L. 96-101 are not unconstitutional and that they offer the Trustee and the creditors a felicitous method of satisfying the claims of those employees who are dislocated by the restructuring of the railroad. The Trustee used sound business judgment in taking advantage of Congress' proffer in this instance.

Several parties have filed objections to the Trustee's motions. We find nothing in the M.R.R.A. which requires this agreement to be approved or even grants us the power to do so. Had a plan not been negotiated, the Conference Report contains the specific provisions which the managers of the bill desired. *United States Code Congressional & Administrative News* (Nov. 1979) pp. 3326-29. The court's

approval is necessary for borrowing the $75 million, and particularly for determining whether it can properly be made a cost of administration under Section 15(b) but the details of the agreement, and whether it is fair and equitable to the employees, as distinguished from the creditors, are not of primary concern to this court.

We find and conclude that the Trustee complied with the requirements of Section 9(a) by negotiating the agreement in question, even though it may be put into effect before a reorganization plan has been acted upon and even though it may not take care of all the claims of employees who are eventually separated or transferred in restructuring the railroad. The agreement also does not cover claims which might be made under the plan in the event the entire railroad operation is discontinued. All that the trustee can do under P.L. 96-101 is to negotiate an agreement which is "fair and equitable" in the restructuring effort. The agreement which has been filed is estimated to divide the $75 million among the employees who are expected to file claims, in the hope that this will take care of most of those who are dislocated by the implementation of Milwaukee II and will avoid litigating their claims.

Some of the objectors contend that any employee protection plan is premature and should be delayed until a reorganization plan has been approved. There is certainly nothing in P.L. 96-101 which so indicates, and in fact the statute itself contemplates that abandonments and restructuring may take place before any reorganization plan is approved. Congress clearly contemplated in enacting P.L. 96-101 that the Milwaukee Railroad would be restructured for continued operation (Section 2), prohibited directed service by another line until April 1, 1981, (Section 18), provided for expedited abandonment and sales (Section 5) and specifically required the Trustee to negotiate an employee protection agreement on a very short time schedule. The maximum time allowed for this purpose was "immediately" after the National Mediation Board failed to obtain such an agreement

during the 40 days following the effective date of the Act which was November 4, 1979. Thus the M.R.R.A. within its four corners makes it quite apparent that an employee protection agreement was to be executed and put into effect to take care of employee claims as soon as any abandonments or transfers occurred. Several petitions for abandonment or for sales are now under advisement and will soon be acted upon. To delay severance or other aid to employees who are dislocated by such changes would not only defeat the intent of Congress but would also cause severe economic and morale problems among the employees.

Objectors argue that to approve and put into effect an employee protection agreement is anticipating approval of a reorganization plan, which should not be done prematurely or piece-meal. In view of the expedited step-by-step procedure toward restructuring contemplated and facilitated by the M.R.R.A., we see no violation of Section 77 of the Bankruptcy Act by this procedure. On the contrary, if an employee protection program were not in effect as soon as needed for the abandonments and other pre-plan changes contemplated by the M.R.R.A., the possibility of an effective reorganization plan as contemplated by Section 77 could be seriously impaired. The Trustee might be hindered by labor organizations in his effort to effectuate major abandonments or sales unless employee claims for severance pay or relocation are promptly liquidated. Furthermore, if past experience is any guide, it will consume some time to negotiate a satisfactory loan agreement with the F.R.A., and by that time a substantial number of sales or transfers are expected to be consummated. Thus, even though an employee protection agreement does anticipate and facilitate a reorganization plan, this clearly does not violate the M.R.R.A. or Section 77 of the Bankruptcy Act.

A question has also been raised concerning the rights of employees who may be terminated or transferred after the $75 million has been paid out. Such an eventuality is possible but not predictable. At present, the Trustee and the court expect

the Milwaukee Railroad to continue operation on a reduced scale indefinitely. The Trustee cannot make an accurate computation of the number or dollar amount of claims which will be filed under the agreement, partly because acceptance of the benefits are voluntary on the part of the affected employees and partly because the total amount of claims will depend on whether presently undesignated employees accept transfers in lieu of termination. The best estimate of both the Trustee and the labor unions is that the available $75 million will pay the claims which will be filed if the reorganization plan for Milwaukee II goes into effect substantially as now proposed. This judgment properly assumes that the benefits available under the plan will be accepted by all or most of the affected employees because the alternative of filing a claim against the estate is less attractive. The terms of the agreement do not bind the estate beyond the $75 million which is now available (Section 5(e)(2) and Section 9(f)). If the $75 million is not sufficient and if Congress or the F.R.A. refuses to provide more funds to the Trustee for employee protection, then the remaining employees will be relegated to their claims against the estate. Since such claims cannot have greater priority than claims under the agreement, the creditors will not be prejudiced by this alternative.

If the entire railroad must ultimately be abandoned, then laborers' claims could apparently amount to as much as $400 million. The priority of such claims has not been determined in this case or in any other litigation so far as we have been advised by the objectors. In any event, employees who file claims against the estate might obtain more but might obtain less than those who file claims under the employee protection agreement. It is clear, however, that the former group will not be paid as promptly as the latter. We rely upon the ability of the labor unions to protect the interests of their members in negotiating this agreement, and beyond that we do not believe it becomes necessary or appropriate to speculate as to what may be in the best interest of individual employees.

Nor can we find with mathematical certainty whether the creditors will be benefitted by the agreement. Perhaps the

most substantial objection which has been made to the Trustee's motions is that Sections 9 and 15(b) violate Article I, Section 8, Clause 4 of the United States Constitution because they constitute a non-uniform bankruptcy statute. We have previously considered such an objection to Sections 6, 7 and 22 of the statute in our decision of November 23, 1979 and have concluded that the uniformity provision of the Constitution is properly restricted to a region or to the creditors of a particular estate (Decision pp. 3-7). Certainly the effect of requiring $75 million to be a cost of administration affects all creditors of this estate, and it may amend the ultimate reorganization plan accordingly. However, no other railroad in this geographical area is subject to the employee protection provisions of this statute, and the creditors of no other estate will be affected by this priority. Therefore, Section 9 and Section 15(b) of the M.R.R.A. are "uniform" in a constitutional sense. *Vanston Bondholder Protective Committee* v. *Green*, 329 U.S. 156, 172 (1946).

Furthermore, none of the objectors have shown that they will be prejudiced by these provisions, since a potential $400 million claim of undetermined priority is being substantially reduced, yet being granted the statutory priority of an administrative expense. We believe Congress has the power to do this. Cf. *Carpenter* v. *Wabash Railway Co. et al.*, 309 U.S. 23 (1940). However, if it turns out that the $75 million of claims have been given an unconstitutional preference, then the government's loan will be relegated to its proper priority under the reorganization plan. In short, the possible unconstitutionality of Section 15(b) is no ground for denying the Trustee's motion to borrow $75 million. If claims which are paid under Section 9(d) constitute an unconstitutional preference, the creditors have their remedy under the Tucker Act. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974).

Finally, the common stockholders and some of the secured creditors contend that their interests are being unconstitutionally eroded by the priority granted in Section

15(b). We have dealt with this argument several times in the past, once since the M.R.R.A.'s abandonment provisions became effective (Decision of January 16, 1980 approving borrowing for rehabilitation and repair). Suffice it to say that the Trustee may borrow money for proper business purposes so long as reorganization is "possible," even though, during the period when a reorganization plan is under consideration and is being implemented, the equity of the estate is being used for continuing the operations. *Matter of Chicago, Rock Island and Pacific R. Co.*, 545 F.2d 1087 (7th Cir. 1976).

We find and conclude that the Trustee's employee protection agreement filed with his motion on January 3, 1980 is fair and equitable to the estate. Even though Section 9(c)(1) of the M.R.R.A. does not make this plan subject to the court's approval, we recognize a responsibility to the creditors and to the public to see that the Trustee does not make wasteful or improvident financial commitments. The agreement in this case was freely negotiated with the labor organizations as mandated by P.L. 96-101, avoiding the necessity of any intervention by the National Mediation Board, or by the Congress. The Trustee has reduced the estate's potential obligation by this agreement and has provided benefits for his employees which the unions believe to be fair and equitable and which will facilitate the abandonment or transfer of undesirable portions of the railroad's system. We see no practical alternative to the negotiation of such a plan, and, since it appears reasonably likely to be implemented within the $75 million limit during the restructuring of the Milwaukee Railroad, it is a fair and equitable trade-off for the creditors.

Therefore the Trustee's motions of November 1, 1979 and January 3, 1980 are granted, and he may serve and present an appropriate order.

ENTER:

/s/ THOMAS R. MCMILLEN
Judge, U.S. District Court

DATED: Feb. 7, 1980

APPENDIX B
Notice Of Appeal To The United States Court Of Appeals For The Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
In the Matter of:
CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY, *Debtor.*
In Proceedings for the Reorganization of a Railroad
No. 77-B-8999

JOINT NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor and Chicago Milwaukee Corporation, a corporation, principal stockholder, hereby jointly appeal to the United States Court of Appeals for the Seventh Circuit from the following order:

1. Order Number 286 dated February 7, 1980 and docketed February 8, 1980, granting the trustee's motions to borrow $75 million from the Federal Railroad Administration

to finance a labor protection settlement program and for approval of the specific labor protection agreement.

DATED: March 7, 1980

OF COUNSEL:

LEONARD GESAS
STEVEN B. TOWBIN
AUGUST A. PILATI
GESAS AND TOWBIN
29 South La Salle Street
Chicago, Illinois 60603
312/726-3100

JOSEPH A. MAUN
JEROME B. SIMON
M. MICHAEL MONAHAN
MAUN, GREEN, HAYES,
SIMON, MURRAY AND
JOHANNESON
332 Hamm Building
St. Paul, Minn. 55102

/s/ STEVEN B. TOWBIN
Steven B. Tobin
One of the Attorneys
for Chicago,
Milwaukee, St. Paul
and Pacific Railroad
Company, Debtor,
and Chicago
Milwaukee
Corporation Principal
stockholder

APPENDIX C

Excerpts From The Milwaukee Railroad Restructuring Act

A. Section 9, 45 U.S.C.A. §908

EMPLOYEE PROTECTION AGREEMENTS — AGREEMENT BETWEEN MILWAUKEE RAILROAD AND LABOR ORGANIZATIONS

SEC. 9(a) The Milwaukee Railroad and labor organizations representing the employees of such railroad may, not later than 20 days after November 4, 1979, enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad. Such employee protection may include, but need not be limited to, interim employee assistance, moving expenses, employee relocation incentive compensation, and separation allowances.

(b) If the Milwaukee Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 20 days after November 4, 1979, the parties shall immediately submit the matter to the National Mediation Board. The National Mediation Board shall attempt, by mediation, to bring the parties into an agreement with respect to employee protection no later than 40 days after November 4, 1979.

(c)(1) If the National Mediation Board is unable to bring the parties to an agreement under subsection (b) of this section within 40 days after November 4, 1979, the Milwaukee Railroad and the labor organizations representing the employees of such railroad shall immediately enter into an employee protection agreement that is fair and equitable.

(2) If an employee protection agreement is entered into under this subsection, any claim of an employee for benefits and allowances under such agreement shall be filed with the Board in such time and manner as the Board by regulation

shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement and shall certify such amount to the Milwaukee Railroad for payment.

(d) Benefits and allowances under an employee protection agreement entered into under this section shall be paid by the Milwaukee Railroad in accordance with section 914 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Milwaukee Railroad.

* * *

B. Section 13, 45 U.S.C.A. §912

ELECTION

SEC. 13 Any employee who receives any assistance under section 909 or section 911 of this title or under an employee protection agreement entered into under section 908 of this title shall be deemed to waive any employee protection benefits otherwise available to such employee under the Bankruptcy Act, subtitle IV of Title 49, or any applicable contract or agreement.

* * *

C. Section 15, 45 U.S.C.A. §914

OBLIGATION GUARANTEES — AUTHORIZATION

SEC. 15(a) The Secretary of Transportation, under the authority of section 831 of this title, shall guarantee obligations of the Milwaukee Railroad for purposes of providing employee protection in accordance with the terms of the employee protection agreement entered into under section 908 of this title. Guarantees under this section shall be entered into without regard to the requirements of subsection (g) of section 831 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Milwaukee Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Milwaukee Railroad in connection with benefits and allowances provided under an employee protection agreement entered into under section 908 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement entered into under section 908 of this title.

(f) Section 836 of this title shall not apply to any obligation guaranteed under this section.

APPENDIX D
Order Of The United States Court Of Appeals For The Seventh Circuit November 3, 1980

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
AMENDED ORDER*
November 3, 1980

By the Court:
No. 80-1346

IN THE MATTER OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor,*

APPEALS OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor* AND CHICAGO MILWAUKEE CORPORATION, a corporation, principal stockholder.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-B-8999
THOMAS R. MCMILLEN, JUDGE

No. 80-2487
IN THE MATTER OF;
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,*
APPEAL OF:

RAILWAY LABOR EXECUTIVE'S ASSOCIATION.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-B-2697
FRANK J. MCGARR, JUDGE

---

* The court's order of October 23, 1980, was wrongly captioned. That order is vacated.

ORDER

The Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company has moved to consolidate Appeal No. 80-1346 and 80-2487 or, in the alternative, for leave to intervene as an amicus curiae in Appeal No. 80-2487. After reviewing the motion and the attached exhibits, the Court DENIES the motion to consolidate Appeal No. 80-2487 with Appeal No. 80-1346, and GRANTS the Trustee leave to file as amicus curiae in Appeal No. 80-2487 for the purpose of filing briefs.

APPENDIX E
Order Of The United States Court Of Appeals For The Seventh Circuit
November 3, 1980

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 3, 1980
By the Court:
No. 80-2487
In the Matter of:
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY, *Debtor,*
Appeal Of:

RAILWAY LABOR EXECUTIVE'S ASSOCIATION.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 75-B-2697
FRANK J. MCGARR, JUDGE

This matter comes before the Court for its consideration upon the filing of the following documents:

1. "MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO CERTIFY THE QUESTION ON THIS APPEAL TO THE UNITED STATES SUPREME COURT" filed herein on October 25, 1980 by counsel for the Trustee of the Chicago, Rock Island and Pacific Railroad Company.

2. "MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS OR CERTIFY" filed herein on October 31, 1980 by counsel for Richard B. Ogilvie as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as amicus curiae.

3. "SUBMISSION OF BRIEF BY RICHARD B. OLILVIE, TRUSTEE OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN SUPPORT OF APPELLANTS AND MOTION TO FILE OVERSIZE BRIEF" filed herein on October 28, 1980.

On consideration thereof,

IT IS ORDERED that the "MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO CERTIFY THE QUESTION ON THIS APPEAL TO THE UNITED STATES SUPREME COURT" shall be taken with the case. Counsel for the Trustee shall file an additional 21 copies of this motion for distribution to the full court. Appellant may respond to this motion in its reply brief.

IT IS FURTHER ORDERED that the "MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS OR CERTIFY," treated as a motion for leave to respond to the motion to dismiss is hereby DENIED. The amicus curiae motion suggests no interest that it has in the questions raised by the motion to dismiss.

IT IS ALSO FURTHER ORDERED that the "SUBMISSION OF BRIEF BY RICHARD B. OGILVIE, TRUSTEE OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN SUPPORT OF APPELLANTS AND MOTION TO FILE OVERSIZE BRIEF" is hereby GRANTED.